Supreme Court, U. S.
FILED
SEP 2 1977
MICHAEL RODAK, JR., CLERK

No. 76-1590

In the Supreme Court of the United States

OCTOBER TERM, 1977

PATRICK L. TIGHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22a-28a) is reported at 551 F. 2d 18. The opinion of the district court (Pet. App. 1a-21a) is not reported.

QUESTIONS PRESENTED

1. Whether testimony by undercover agents concerning statements of petitioner while selling them prescriptions was properly admitted into evidence.

2. Whether the Attorney General could properly classify biphetamine as a Schedule II controlled substance under the Controlled Substances Act, 21 U.S.C. 801, *et seq.*

3. Whether petitioner had, or reasonably could have been expected to have, notice of biphetamine's inclusion as a Schedule II controlled substance under the Controlled Substances Act, 21 U.S.C. 801, *et seq.*

4. Whether petitioner could properly be convicted for violating 21 U.S.C. 841(a) despite the fact that none of the prescriptions that he sold to undercover agents was filled.

5. Whether the evidence presented at trial was sufficient to support the conviction of petitioner for violations of 21 U.S.C. 841(a).

6. Whether petitioner was deprived of a fair trial by the closing argument of the prosecutor.

7. Whether the trial court's instructions to the jury were so confusing and improper as to constitute grounds for reversal.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of eighteen counts of dispensing a Schedule II controlled substance, biphetamine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2(b). He was given concurrent sentences of six months' imprisonment and a fine of $15,000 on each count, the imprisonment to be followed by a total special parole term of 36 years (Pet. App. F). A motion for a new trial was denied by the district court (Pet. App. 1a-21a), and the court of appeals affirmed (Pet. App. 22a-28a).

The evidence showed that over a six-month period petitioner, a licensed and practicing physician, sold 18 prescriptions for biphetamine to two state undercover drug enforcement agents who visited him at his office

(Pet. App. 23a). Biphetamine contains amphetamine and is used medically for obesity. Petitioner charged $8.00 for a single prescription of 32 to 40 tablets, $12.00 for two such prescriptions, and a negotiable fee of $15.00 to $20.00 for three prescriptions (see Pet. App. 15a). Petitioner provided the prescriptions without conducting any physical examination of the undercover agents and without obtaining the agents' medical history. In addition, petitioner was told that the agents would themselves transfer the prescribed drugs to third persons (*ibid.*). In fact, the agents never had the prescriptions filled, but instead placed them in the investigation file (Pet. App. 23a).

ARGUMENT

1. There is no substance to the claim (Pet. 10-17) that incriminating statements made by petitioner were improperly placed into evidence. The statements were made by petitioner in the course of selling prescriptions to undercover agents. The agents' conduct did not violate *Miranda* v. *Arizona*, 384 U.S. 436. The warnings required by that decision must be given only when the subject of a police investigation has been taken into custody or otherwise deprived of his freedom in a significant way. *Beckwith* v. *United States*, 425 U.S. 341. Nor was the agents' testimony concerning statements made by petitioner on several occasions when prescriptions were sold hearsay. Fed. R. Evid. 801(d)(2). *A fortiori*, it was not inadmissible hearsay.

2. Petitioner contends (Pet. 17-20) that classification of biphetamine as a Schedule II controlled substance is improper because accomplished pursuant to an unconstitutional delegation of legislative power in 21 U.S.C. 811(a)(1). Section 811(a)(1) authorizes the Attorney General,

after he has made appropriate findings, to transfer controlled substances between the schedules established in Section 812. The district court correctly concluded that the statute does not contain an unconstitutional delegation of legislative power. In Section 811(c), Congress has provided a detailed list of factors for the Attorney General to consider in exercising his authority under Section 811(a)(1). In addition, Section 811(b) requires the Attorney General to consult with the Secretary of Health, Education, and Welfare before transferring a controlled substance from one schedule to another. The Secretary is directed to provide a written scientific and medical evaluation of the substance under consideration, together with a written recommendation as to whether the substance should be controlled, and, if so, under which schedule. The criteria for inclusion under a particular schedule are not unconstitutionally vague. Inability of pharmacologist witnesses to define the phrase "severe psychological or physical dependence" hardly demonstrates that that language is not susceptible of meaningful application by qualified medical personnel. In sum, action by the Attorney General under Section 811(a)(1) is clearly governed by adequate statutory standards. See *United States* v. *Pastor*, 419 F. Supp. 1318, 1334-1340 (S.D.N.Y.); see also *Iske* v. *United States*, 396 F. 2d 28 (C.A. 10); *White* v. *United States*, 395 F. 2d 5 (C.A. 1), certiorari denied, 393 U.S. 928.

3. The evidence at trial revealed that petitioner knew he was acting unlawfully in selling biphetamine prescriptions. Petitioner should not be heard to complain that he was unaware of the reclassification of biphetamine from Schedule III to Schedule II, since his acts would have been illegal regardless of the schedule applicable to the drug. If such information was critical to petitioner's decision whether or not to violate the statute,

it was readily available, not only in the Federal Register but also from the manufacturer of biphetamine. See Pet. App. 11a.

4. Section 841(a)(1) makes it unlawful for any person knowingly or intentionally to dispense a controlled substance, except as authorized by statute. Under Section 802(10), the term "dispense" means "to deliver a controlled substance to an ultimate user * * *." Section 802(8) provides that the term "deliver" means "the actual, constructive, or attempted transfer of a controlled substance * * *." Petitioner's sale of biphetamine prescriptions plainly constituted an attempted transfer of a controlled substance. Petitioner's focus (Pet. 25-26) on the definition of the term "ultimate user" is misplaced. As the Third Circuit noted in its opinion, if proof of an attempted transfer to an ultimate user required proof that that user had obtained actual possession, *attempted* transfer would essentially be eliminated from the definition of the terms "deliver" and "dispense." See Pet. App. 25a-27a.

United States v. *Green*, 511 F. 2d 1062, 1072 (C.A. 7), certiorari denied, 423 U.S. 1031, is not to the contrary. There, the Seventh Circuit held that "a prescription need not be filled to make out a case of attempting to dispense against a physician." The court did not decide whether "a prescription must be filled to complete the crime of dispensing a controlled substance." Since the term "dispense" includes attempted transfer, proof that a prescription was filled is not a prerequisite for conviction of the completed offense.[1]

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[1]Even if this statutory construction were incorrect, and such proof is necessary for conviction of the completed offense, petitioner is at most entitled to entry of a judgment of conviction for attempting to dispense a controlled substance. The penalties applicable to

5. Petitioner contends (Pet. 27) that since he is a physician, his violation of the statute must be blatant before he may be prosecuted under Section 841(a). This is incorrect. See *United States* v. *Moore*, 423 U.S. 122. In *Green, supra*, the Seventh Circuit was confronted with facts virtually identical to those presented here. The court affirmed a conviction under Sections 841(a) and 846 for attempting to dispense a controlled substance. The court did not suggest that prosecution under Section 842 might have been more appropriate.

6. Petitioner also seeks (Pet. 21-25) review of the propriety of the prosecution's closing argument. Examination of that argument (set forth at Pet. App. 66a-76a) reveals that petitioner's complaints are groundless. Petitioner objected on only a few occasions at the time the prosecutor's remarks were made; in those instances, his objections were sustained. Nothing in the remainder of the prosecutor's statements constitutes plain error justifying reversal despite lack of contemporaneous objection, and there is no occasion for this Court to undertake review of the determination of the lower courts (Pet. App. 19a-21a, 27a-28a) that petitioner is not entitled to a new trial on this ground.

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the attempted and completed offenses are the same, and the district court was clearly aware of all those facts concerning petitioner's conduct which were relevant to determination of sentence. Since the jury returned a guilty verdict on the charge of dispensing, it necessarily found facts sufficient to support a conviction for attempting to dispense. Modification of the district court's judgment in the manner suggested is appropriate even where, as in this case, the district court did not instruct the jury on attempt. See 28 U.S.C. 2106; *United States* v. *Swiderski*, 548 F. 2d 445 (C.A. 2) (no instruction given as to simple possession, but judgment modified from conviction of possession with intent to distribute to conviction of simple possession).

7. Petitioner attacks (Pet. 28-30) a portion of the district court's instructions to the jury as confusing. Petitioner was charged with dispensing a controlled substance, namely biphetamine. The definition of the term "ultimate user" was, of course, relevant to the formal description of that offense. After objection by petitioner stressing that none of the prescriptions at issue had ever been filled, the district judge informed the jury that he intended the definition of "ultimate user" to apply only to the phendimetrazine, pink pills introduced for the limited evidentiary purpose of showing intent and not mentioned in petitioner's indictment. To the extent that the district judge may have erred in so instructing the jury, his error was harmless. The court had already ruled as a matter of law that the crime of dispensing a controlled substance could be established even without proof that the prescriptions for biphetamine had been filled. This ruling was correct, as demonstrated in point 4, *supra*. Moreover, the district court made perfectly clear to the jury that petitioner was not being charged with any offense involving phendimetrazine, and indeed petitioner was convicted of no such offense. Petitioner thus suffered no prejudice from any confusion that may have surrounded the district court's instruction concerning the definition of "ultimate user."

In light of the district court's charge, the judgment of conviction should have contained no reference to either distribution of a controlled substance or violation of 18 U.S.C. 2(b). The judgment adhered too closely to the language of petitioner's original indictment. Even conceding this, however, mistakes made in drafting a judgment that the court entered in June 1976 can hardly be thought to reflect error or confusion in instructions given to the jury by the district court more than a year earlier.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1977.

DOJ-1977-08